BX Steel Posco Cold Rolled Sheet Co Ltd v Minister of Finance & Ors (FIW Steel Sdn Bhd, intervener)

HIGH COURT (KUALA LUMPUR) — APPLICATION FOR JUDICIAL REVIEW NO WA-25–162–04 OF 2019
NORDIN HASSAN J
8 JANUARY 2020

Adminstrative Law — Judicial review — Certiorari — Challenge of decision to impose anti-dumping duties — Whether decision to impose duties unreasonable — Whether decision in breach of s 17 of the Countervailing and Anti-Dumping Duties Act 1993 when failing to use the price actually paid for by the Malaysian importers — Whether the decision involved a pre-judgement — Whether the second, fourth and sixth respondents were legal entities

This was a judicial review application by the applicant for two orders of centiorari seeking to: (a) quash the decision of the first respondent to impose anti-dumping duties originated or exported from the applicant from 8 March 2019 to 7 March 2024 to Malaysia; and (b) to quash the recommendation of the third and fourth respondent to the first respondent to impose the said anti-dumping duties. The applicant is the People's Republic of China's company and incorporated in 2004. Its business activities included the production and sale of cold rolled coils, full hard plates, hot dip galvanised plates, coated plates, coated thin plates and related by products. On 26 June 2018, the third and fourth respondents received a petition for the application for anti-dumping duties on imports of galvanised iron originating from the People's Republic of China ('the PRC') and the Socialist Republic of Vietnam dated 25 June 2018 from the intervener pursuant to s 20 of the Countervailing and Anti-Dumping Duties Act 1993 ('the CADD 1993') which requested the third and fourth respondents to initiate an anti-dumping investigation on imports of galvanised iron originating or exported from the PRC and Vietnam. Thereafter, on 25 July 2018, the third respondent, by notice published in the Government *Gazette* No PU(B) 435, initiated an anti-dumping investigation on flat rolled product of iron alloy or non-alloy, plated or coated with zinc, using hot dip process originating or exported from the PRC and Vietnam to Malaysia under the CADD 1993 and its regulations. The third respondent delegated its investigative power to the fourth respondent as the investigation authority ('the IA'). During the process of investigation, the applicant had submitted the foreign producer's/exporter's questionaire response to the IA. Further, the third respondent vide the Notice of Affirmative Preliminary Determination No PU(B) 624 and preliminary determination report both dated 8 November2018 recommended to the first respondent to impose a provisional anti-dumping duty of 6.25% originating or export from the

A applicant for 120 days from 8 November 2018. Based on this proposal, the first respondent imposed a provisional anti-dumping duty of 6.25% originating or exported by the applicant from 8 November 2018 to 7 March 2019. On 23 November 2018, the applicant submitted its comments on the preliminary determination report mentioning the IA's flawed and ultra vires calculation B methodology in the said preliminary determination report. The applicant further requested the respondents to reconsider the preliminary determination report. The IA then conducted a verification visit to the applicant's premises in the PRC from 29 November 2018 to 30 November 2018 and verified the information submitted by the applicant in its foreign producer's/exporter's C questionnaire. Next, on 24 January 2019, the IA released its final disclosure in the form of a notice of essential facts ('the NOEF'). In this NOEF, the IA had not changed its calculation methodology despite the comments given by the applicant. In the NOEF, the IA recommended to the third respondent to D propose to the first respondent to impose a final anti-dumping duty of 5.47%. The applicant further gave its comments dated 30 January 2019 on the NOEF and urged the respondents including the IA to base their calculation methodology based on the law. On 4 February 2019, the applicant's solicitors had a meeting with the IA and gave the explanation on the calculation E methodology pursuant to the law. In any event, a Notice of Affirmative Final Determination No PU(B) 126 and the final determination report was prepared by the IA both dated 7 March 2019 where the third respondent recommended to the first respondent to impose a final anti-dumping duty at 5.47% from March 2019 to 7 March 2024. Finally, by a Customs (Anti-Dumping Duties) F Order 2019 dated 8 March 2019, the first respondent imposed a final anti-dumping duty of 5.47%. The issues for determination in this judicial review application were: (a) whether the decision to impose the duties was unreasonable as the third respondent admitted that the IA made calculation errors in calculating the anti-dumping duties; (b) whether the decision was in G breach of s 17 of the CADD 1993 in failing to use the price actually paid for by the Malaysian importers on the subject merchandise; (c) whether the decision involved a pre-judgment; and (d) whether the second, fourth and sixth were legal entity and could be sued.

H **Held**, allowing the application with costs of RM15,000:

(1) The existence of this error of calculation as admitted certainly do not support the findings by the IA and further recommended by the third respondent to the first respondent, to impose the anti-dumping duties of 5.47%. Consequently, the final anti-dumping duty of the said 5.47% I imposed by the first respondent vide Custom (Anti-Dumping Duties) Order 2019 dated 8 March 2019 also fell into an error. Clearly, the facts do not support the recommendation made by the third respondent and the final decision by the first respondent and a basis for setting aside the recommendation and decision (see paras 13–14).

(2) Provision of s 17(1) was plain and unambiguous that the export price was the price actually paid for the subject merchandise which was the price paid by the importer. In the circumstances, the court found, the method of calculation by not using the export price, the price actually paid by the Malaysian importer was in contravention of s 17 of the CADD 1993 and in excess of their jurisdiction (see paras 23 & 33).

(3) Clearly, the third respondent failed to take into account the relevant issues in the final determination report and pre-judged the matter when issuing the notice of affirmative determination. This falls under '*Wednesbury* unreasonableness, it defies logic and irrational'. As such the issue raised by the respondents was devoid of merits (see paras 35 & 41).

(4) In the present case, the second, fourth and sixth respondents were not being sued, but their decision were being challenged by the applicant. As such, s 21(1) of the Government Proceedings Act 1956 has no application in the present case (see para 43).

[Bahasa Malaysia summary

Ini merupakan satu permohonan semakan kehakiman oleh pemohon untuk dua perintah centiorari yang memohon agar: (a) membatalkan keputusan responden pertama untuk mengenakan duti *anti-dumping* yang datang atau dieksport daripada pemohon daripada 8 Mac 2019 hingga 20 Mac 2024 ke Malaysia; dan (b) untuk membatalkan cadangan responden ketiga dan keempat kepada responden pertama untuk mengenakan duti *anti-dumping* tersebut. Pemohon adalah satu syarikat daripada Republik Rakyat China ('Republik tersebut') yang di tubuhkan pada 2004. Aktiviti perniagaannya termasuklah membuat dan menjual *cold rolled coils*, *full hard plates*, *hot dip galvanised plates*, *coated plates*, *coated thin plates* dan by-produk yang berkaitan. Pada 26 Jun 2018, responden ketiga dan keempat menerima satu petisyen memohon agar duti *anti-dumping* pada besi tergalvani yang berasal atau diimport dari Republik tersebut dan Republik Sosialis Vietnam bertarikh 25 Jun 2018 daripada pencelah selaras dengan s 20 Countervailing and Anti-Dumping Duties Act 1993 ('Akta tersebut') memohon agar responden ketiga dan keempat untuk memulakan satu siasatan berkaitan dengan pengimportan besi tergalvani yang berasal atau diimport dari Republik tersebut atau Vietnam. Selepas dari itu, pada 25 Julai 2018, responden ketiga, melalui satu notis yang diwartakan dalam *Warta* Kerajaan No PU(B) 435, memulakan satu siasatan *anti-dumping* bekaitan dengan *flat rolled product of iron alloy or non-alloy*, *plated or coated with zinc*, *using hot dip process* yang berasal atau dieksport dari Republik tersebut dan Vietnam ke Malaysia dibawah Akta tersebut dan peraturan-peraturannya. Responden ketiga mewakilkan kuasa siasatannya kepada responden ketiga sebagai otoriti untuk menjalankan siasatan ('IA tersebut'). Semasa proses siasatan, pemohon telah menyerahkan jawapan soal selidik pembuat/pengeksport asing kepada IA tersebut. Lanjutan itu, responden ketiga melalui Notis Keputusan Awal No

PU(B) 624 dan laporan keputusan awal yang kedua-duanya bertarikh 8 November 2018 mencadangkan agar responden pertama untuk mengenakan duti *anti-dumping* sementara pada tarif 6.25% yang berasal atau dieksport oleh pemohon dari 8 November 2018 kepada 7 Mac 2019. Pada 23 November 2018, pemohon telah menyerahkan komennya berkaitan dengan laporan keputusan awal dan menyatakan bahawa IA tersebut telah terkhilaf dan ultra vires dalam metodologi pengiraannya dan laporan keputusan awal tersebut. Pemohon kemudiannya memohon agar responden untuk menimbangkan semula laporan keputusan awal tersebut. IA tersebut kemudiannya telah melakukan lawatan pengesahan di premis pemohon di Republik tersebut pada 29 November 2018 hingga 30 November 2018 dan mengesahkan maklumat yang disahkan oleh pemohon dalam jawapan soal selidik pembuat/pengeksport asing yang diserahkannya. Kemudiannya pada 24 Januari 2019, IA tersebut mengeluarkan maklumat akhirnya dalam bentuk satu notis fakta asas ('NOEF tersebut'). Dalam NOEF ini, IA tersebut tidak mengubah metodologi pengiranya tanpa mengambil kira komen yang diberikan oleh pemohon. Dalam NOEF, IA tersebut mencadangkan kepada responden ketiga untuk mencadangkan kepada responden pertama untuk mengenakan duti *anti-dumping* muktamad pada tarif 5.47%. pemohon kemudiannya memberi komen lanjut mereka bertarikh 30 Januari 2019 berkaitan dengan NOEF dan memohon agar responden dan juga IA tersebut untuk membuat pengiraan mereka berdasarkan undang-undang. Pada 4 Februari 2019, peguam pemohon bermesyuarat dengan IA tersebut dan memberikan penjelasan berkaitan dengan metodologi pengiraan berdasarkan undang-undang. Dalam apa keadaan sekalipun, satu notis keputusan muktamad No PU(B)126 dan laporan keputusan muktamad telah disediakan oleh IA tersebut, kedua-duanya bertarikh 7 Mac 2019 yang mana responden ketiga mencadangkan kepada responden pertama untuk mengenakan duti *anti-dumping* sebanyak 5.47% antara Mac 2019 hingga 7 Mac 2024. Akhirnya, melalui Perintah Kastam (Duti Anti-Lambakan) 2019 bertarikh 8 Mac 2019, responden pertama mengenakan duti *anti-dumping* sebanyak 5.47%. isu untuk diputuskan dalam permohonan semakan kehakiman ini adalah: (a) sama ada keputusan untuk mengenakan duti tersebut adalah tidak munasabah kerana responden ketiga mengakui bahawa IA tersebut telah membuat kesilapan pengiraan dalam mengira duti *anti-dumping*; (b) sama ada keputusan tersebut bercanggah dengan s 17 Akta tersebut dalam gagal untuk menggunakan harga yang sebenarnya dibayar oleh pengimport Malaysia berkaitan dengan barangan yang berkaitan; (c) sama ada keputusan tersebut melibatkan pengadilan terlebih dahulu dan (d) sana ada responden kedua, keempat dan keenam adalah entiti sah di sisi undang-undang dan boleh disaman.

Diputuskan, membenarkan permohonan dengan kos RM15,000:

(1) Kewujudan kesalahan pengiraan sepertimana yang diakui sememangnya

tidak menyokong dapatan IA tersebut dan cadangan lanjut responden ketiga kepada responden pertama untuk mengenakan duti *anti-dumping* sebanyak 5.47%. Oleh itu, duti *anti-dumping* akhir sebanyak 5.47% yang dikenakan oleh responden pertama melalui Perintah Kastam (Duti Anti-Dumping) 2019 bertarikh 8 Mac 2019 juga adalah khilaf. Adalah jelas bahawa fakta tidak menyokong cadangan yang dibuat oleh responden ketiga dan keputusan akhir oleh responden pertama dan satu dasar untuk mengetepikan keputusan yang dibuat (lihat perenggan 13–14).

(2) Peruntukan s 17(1) adalah jelas bahawa harga eksport adalah harga yang sebenarnya dibayar untuk barangan tersebut yang mana merupakan harga yang dibayar oleh pengimport. Dalam keadaan ini, mahkamah mendapati bahawa metodologi pengiraan dengan tidak menggunakan harga eksport, harga yang sebenarnya dibayar oleh pengimport Malaysia adalah bercanggah dengan s 17 Akta tersebut dan melampaui bidang kuasa mereka (lihat perenggan 23 & 33).

(3) Adalah jelas bahawa responden ketiga gagal untuk mengambil kira isu yang relevan dalam laporan keputusan muktamad dan membuat pengadilan awal perkara tersebut semasa mengeluarkan notis keputusan afirmatif. Perkara ini terjumlah dibawah '*Wednesbury* unreasonableness', ianya tidak masuk akal dan tidak rasional. Oleh itu, isu yang dibangkitkan responden adalah tanpa merit (lihat perenggan 35 & 41).

(4) Dalam kes ini, responden kedua, keempat dan keenam tidak disaman tetapi keputusan mereka dicabar oleh pemohon. Oleh itu, s 21(1) Akta Prosiding Kerajaan 1956 tidak diguna pakai dalam kes ini (lihat perenggan 43)]

Cases referred to

Akira Sales & Services (M) Sdn Bhd v Nadiah Zee bt Abdullah and another appeal [2018] 2 MLJ 537; [2018] 2 CLJ 513, FC (refd)

Alam Ventare Sdn Bhd & Anor v Abdul Aziz bin Abdul Majid & Ors [2015] 4 MLJ 270, FC (refd)

Council of Civil Service Unions v Minister for the Civil Service [1985] AC 374, HL (refd)

Jagdis Singh a/l Banta Singh v Outlet Rank (M) Sdn Bhd [2013] 4 MLJ 213; [2013] 3 CLJ 47, CA (refd)

Ketua Pengarah Kastam dan Eksais v Altus Logistic Malaysia Sdn Bhd [2019] MLJU 1328; [2019] 1 LNS 270, HC (folld)

R Rama Chandran v Industrial Court of Malaysia & Anor [1997] 1 MLJ 145; [1997] 1 CLJ 147, FC (refd)

SIS Forum (M) & Ors v Jawatankuasa Fatwa Negeri Selangor & Ors [2018] 3 MLJ 706; [2018] 6 CLJ 748, CA (refd)

Selangor Omnibus Co Bhd v Perumal & Anor [1981] 2 MLJ 124, FC (refd)

A *Syarikat Kenderaan Melayu Kelantan v Transport Workers Union* [1995] 2 MLJ 317, CA (refd)

Legislation referred to

B Countervailing and Anti-Dumping Duties Act 1993 ss 17, 17(1), (2), 20, 34A
Customs (Anti-Dumping Duties) Order 2019
Government Proceedings Act 1956 s 21(1)
Rules of Court 2012 O 41 r 12

C *Jason Teoh (Balqis Md Noor with him) (Jason Teoh & Partners) for the applicant.*
Aisyaf Falina Abdullah (Senior Federal Counsel, Attorney General's Chambers) for the respondents.
(Lee Hishammuddin Allen & Gledhill) for the intervener.

D **Nordin Hassan J:**

INTRODUCTION

[1] This is the applicant's judicial review application for the following E reliefs:

(a) an order of certiorari to quash the decision of the Minister of Finance, the first respondent, to impose anti-dumping duties at the rate of 5.47% on flat rolled product of iron alloy or non-alloy steel, plated or coated F with zinc, using hot dip process (galvanised iron coils/sheets or galvanised steel coils/sheets) originating or exported from applicant from 8 March 2019 to 7 March 2024 to Malaysia; and

(b) an order of certiorari to quash the recommendation of the third and fourth respondents to the first respondent to impose the said G anti-dumping duties at the said rate of 5.47% originating or exported by the applicant during the said period.

THE SALIENT FACTS

H **[2]** The material facts in the present application are the following:

(a) the applicant is the People's Republic of China's company and incorporated in 2004. Its business activities includes the production and sale of cold rolled coils, full hard plates, hot dip galvanised plates, coated I plates, coated thin plates and related by products;

(b) on 26 June 2018, the third and fourth respondents received a petition for the application for anti-dumping duties on imports of galvanised iron originating from the People's Republic of China ('the PRC') and the Socialist Republic of Vietnam dated 25 June 2018 from FIW Steel Sdn

Bhd pursuant to s 20 of the Countervailing and Anti-Dumping Duties Act 1993 ('the CADD 1993');

(c) the petition requested the third and fourth respondents to initiate an anti-dumping investigation on imports of galvanised iron originating or exported from PRC and Vietnam;

(d) thereafter, on 25 July 2018, the third respondent, by notice published in the Government *Gazette* No PU(B) 435, initiated an anti-dumping investigation on flat rolled product of iron alloy or non-alloy, plated or coated with zinc, using hot dip process (galvanised iron coils/sheets or galvanised steel/sheets) originating or exported from PRC and Vietnam to Malaysia under the CADD 1993 and its regulations;

(e) the third respondent delegated its investigative power to the fourth respondent's trade practice section as the investigation authority ('the IA');

(f) during the process of investigation, the applicant has submitted the foreign producer's/exporter's questionaire response to the IA;

(g) further, the third respondent vide the Notice of Affirmative Preliminary Determination No PU(B) 624 and preliminary determination report both dated 8 November 2018 recommended to the first respondent to impose a provisional anti-dumping duty of 6.25% on flat rolled product of iron alloy or non-alloy steel, plated or coated with zinc, using hot dip process (galvanised iron coils/sheets or galvanised steel coils/sheets) originating or export from the applicant for 120 days from 8 November 2018;

(h) based on this proposal, the first respondent imposed a provisional anti-dumping duty of 6.25% originating or exported by the applicant from 8 November 2018 to 7 March 2019;

(i) on 23 November 2018, the applicant submitted its comments on the preliminary determination report mentioning the IA's flawed and ultra vires calculation methodology in the said preliminary determination report. The applicant further requested the respondents to reconsider the preliminary determination;

(j) the IA then conducted a verification visit to the applicant's premises in PRC from 29 November 2018 to 30 November 2018 and verified the information submitted by the applicant in its foreign producer's/exporter's questionnaire. An itemised schedule of the verification visit and verification report were then prepared by the IA;

(k) next, on 24 January 2019, the IA released its final disclosure in the form of a notice of essential facts ('the NOEF'). In this NOEF, the IA had not change its calculation methodology despite the comments given by the

applicant. In the NOEF, the IA recommended to the third respondent to propose to the first respondent to impose a final anti-dumping duty of 5.47%;

(l) the applicant further gave its comments dated 30 January 2019 on the NOEF and urged the respondents including the IA to base their calculation methodology based on the law;

(m) on 4 February 2019, the applicant's solicitors had a meeting with the IA and gave the explaination on the calculation methodology pursuant to the law and presented slide presentation where the power point of the presentation was filed with IA;

(n) in any event, a notice of affirmative final determination No PU(B) 126 and the final determination report was prepared by the IA both dated 7 March 2019 where the third respondent recommended to the first respondent to impose a final anti-dumping duty at 5.47% from March 2019 to 7 March 2024;

(o) finally, by a Customs (Anti-Dumping Duties) Order 2019 PU(A) 69 dated 8 March 2019, the first respondent imposed a final anti-dumping duty of 5.47% on flat rolled product of iron alloy or non-alloy steel, plated or coated with zinc, using hot dip process (galvanised iron coils/sheets or galvanised steel coils/sheets) originating or exported from the applicant from 8 March 2019 to 7 March 2024; and

(p) hence, the present judicial review application.

THE APPELLANT'S GROUNDS IN SUPPORT OF THE JUDICIAL REVIEW

[3] In support of this juidicial review application, the applicant relied on three main grounds which are as follows:

(a) the decision to imposed the anti-dumping duties of 5.47% is unreasonable decision as the third respondent admitted that the IA has made calculation errors in calculating the anti-dumping duties;

(b) the decision is in breach of s 17 of the CADD 1993 in failing to use the price actually paid for by the Malaysian importers of the subject merchandise to arrive at the import price when calculating the applicant's anti-dumping duties. Therefore, the decision is ultra vires and illegal; and

(c) the decision involved a pre-judgment as the third respondent signed the notice of affirmative final determination to recommend the imposition of 5.47% anti-dumping duties to the first respondent before the final

determination report was prepared which set out the findings of the IA. This pre-judgment indicates actual bias on the part of the decision makers.

THE RESPONDENTS' SUBMISSION

[4] Conversely, the respondents submitted that the calculation methodology by the IA is correct based on the provision of s 17(1) and 17(2) of the CADD 1993 and articles 2.3 and 2.4 of World Trade Organisation Anti-Dumping Agreement ('the WTO-ADA').

[5] On the issue of pre-judgment, the respondent contended that in arriving at the decision the third respondent has taken into account all relevant matters and disregard all irrelevant matters. In any event, the respondents submitted that the 'pre-judgment' does not affect the procedure laid down under the WTO-ADA and the decision is an informed decision.

[6] The respondents also raised preliminary issues which are the following:

(a) the applicant's affidavits in support of the judicial review application not in compliance with O 41 r 12 of the Rules of Court 2012 for not having the seal or signature of a court, judge, notary public or person having authority to administer oaths in a Commonwealth country or the seal and signature of consular officer of a Commonwealth country. As such it was submitted the said affidavits are inadmissable and should not be accepted; and

(b) the second, fourth and sixth respondents are not a legal entity to be made parties to this proceeding.

FINDINGS OF THIS COURT

[7] A decision in the exercise of public duties or functions may be reviewed on the grounds of illegality, irrationality, procedural impropriety or disproportionality.

[8] The meaning of illegality, irrationality and procedural impropriety has been succinctly explained by Lord Diplock in *Council of Civil Service Unions v Minister for the Civil Service* [1985] AC 374, and adopted by our apex courts which are as follows:

> *By 'illegality'* as a ground for Judicial Review, I mean that the decision maker must understand correctly the law that regulates his decision making power and must give effect to it. Whether he has or not is par excellence a justiciable question to be decided, in the event of dispute, by those persons, the judges, by whom thejudicial power of the state is exercisable.

By 'irrationality', I mean what can by now be succinctly referred to as 'Wednesbury unreasonableness' (see *Associated Provincial Picture Houses Ltd v Wednesbury Corp* [1948] 1 KB 223). It applies to a decision which is so outrageous in its defiance of logic or of accepted moral standards that no sensible person who had applied his mind to the question to be decided could have arrived at it. Whether a decision falls within this category is a question that judges by their training and experience should be well equipped to answer, or else there would be something badly wrong with our judicial system. To justify the courts' exercise of this role, resort I think is today no longer needed to Viscount Radcliffe's ingenious explanation in *Edwards (Inspector of Taxes) v Bairstow* [1956] AC 14, or irrationality as a ground for a court's reversal of a decision by ascribing it to an inferred though undefinable mistake of law by the decision maker. 'Irrationality' by now can stand on its own feet as an accepted ground on which a decision may be attacked by Judicial Review.

I have described the third head as *'procedural impropriety'* rather than failure to observe basic rules of natural justice or failure to act with procedural fairness towards the person who will be affected by the decisions. This is because susceptibility to judicial review under this head covers also failure by an administrative tribunal to observe procedural rules that the expressly laid down in the legislative instrument by which its jurisdiction is conferred, even where such failure does not involve any denial of natural justice.

(see also *Akira Sales & Services (M) Sdn Bhd v Nadiah Zee bt Abdullah and another appeal* [2018] 2 MLJ 537; [2018] 2 CLJ 513, *R Rama Chandran v Industrial Court of Malaysia & Anor* [1997] 1 MLJ 145; [1997] 1 CLJ 147).

[9] Further, in the case of *Syarikat Kenderaan Melayu Kelantan v Transport Workers Union* [1995] 2 MLJ 317, the error of law has been described as follows:

It is neither feasible nor desirable to attempt an exhaustive definition of what amounts to an error of law, for the categories of such an error are not closed. But it may be said that an error of law would be disclosed if the decision-maker asks himself the wrong question or takes into account irrelevant considerations or omits to take into account relevant considerations (what may be conveniently termed an Anisminic error) or if he misconstrues the terms of any relevant statute, *or misapplies or misstates a principle of the general law*.

[10] Reverting to the present case, firstly is in relation to the third respondent's admission that the IA made calculation error in calculating the anti-dumping duties.

[11] In this regard, the third respondent in the affidavit in reply deposed as follows:

18. Perenggan 28 Afidavit Sokongan Pemohon adalah dinafikan dan *saya sesungguhnya menyatakan bahawa pengiraan yang dibuat oleh PBP hanya mempunyai kesilapan penggunaan harga Free on Board Export price sebagai harga asas.*

19. *Perenggan 29 hingga 30* Afidavit Sokongan Pemohon, adalah diakui dan saya

sesungguhnya menyatakan bahawa *setelah pengiraan disemak semula, PBP mendapati bahawa semasa pengiraan harga eksport ex-factory Pemohon, PBP telah menggunakan harga Free on Board Export Price sebagai harga asas sebelum pelarasan dibuat dengan menolak kos-kos tertentu, termasuk kos pengangkutan laut*. Sehubungan itu, *setelah dikira semula, kadar margin lambakan yang sepatutnya diperolehi untuk Pemohon tanpa menolak kos pengangkutan laut adalah 3.12%.*

[12] The undisputed fact is that the third respondent admitted that the IA had wrongly deducted ocean freight value from the total free on board export price ('the FOB') of the subject merchandise when calculating the anti-dumping duties. The third respondent further conceded that if the said error is rectified a lower margin of 3.12% would be applicable.

[13] The existence of this error of calculation as admitted certainly do not support the findings by the IA and further recommended by the third respondent to the first respondent, to impose the anti-dumping duties of 5.47%. Consequently, the final anti-dumping duty of the said 5.47% imposed by the first respondent vide Custom (Anti-Dumping Duties) Order 2019 dated 8 March 2019 also fell into an error.

[14] Clearly, the facts do not support the recommendation made by the third respondent and the final decision by the first respondent and a basis for setting aside the recommendation and decision.

[15] In relation to this, the Federal Court in *Alam Ventare Sdn Bhd & Anor v Abdul Aziz bin Abdul Majid & Ors* [2015] 4 MLJ 270, held as follows:

> [22] A decision of an inferior tribunal is amenable to judicial review where the facts do not support the conclusion arrived at by the tribunal or the findings of the tribunal had been arrived at by taking into consideration irrelevant matters or disregarding relevant matters: *Ranjit Kaur a/p S Gopal Singh v Hotel Excelsior (M) Sdn Bhd* [2010] 6 MLJ 1.

[16] This court is duty bound to inquire the facts to determine whether the decision was properly made as explained by the Federal Court in *Selangor Omnibus Co Bhd v Perumal & Anor* [1981] 2 MLJ 124, in the following words:

> If a judgment requires, before it can be made, the existence of some facts, then, although the evaluation of those facts if for the Minister alone, *the court may inquire whether those facts exist, and have been properly taken into account, whether the judgment has not been made upon other facts which ought not to have been taken into account. If these requirements are not met, then the exercise of judgment, however bona fide it may be, becomes capable of challenge.*

[17] In addition, all the relevant information has been forwarded to the IA in the applicant's foreign producer's/exporter's questionnaire and verified by the IA during its visit to PRC from 29 November 2018 to 30 November 2018.

[18] The applicant had urged the IA in its comments dated 23 November 2018 on the preliminary determination report to rectify the method of calculation and again in its comment dated 30 January 2019 on the NOEF prepared by the IA. Further the applicant's solicitor met with the IA and again urged the IA to follow the method of calculation pursuant to the provisions of the law. However, all the applicant's request was disregarded.

[19] The applicant's submission of facts and data to the IA and the admission by the third respondent on the calculation error did not support the anti-dumping duties of 5.47% as recommended by the third respondent and decided by the first respondent. This pertinent fact alone is sufficient for this court to allow the judicial review application.

[20] The next ground raised by the applicant is with regards to the non-compliance of s 17 of the CADD 1993 by the first to fourth respondents.

[21] The applicant submitted that the first to fourth respondents acted in excess of their jurisdiction in failing to use the price actually paid by the Malaysian importers to arrive at the export price based. Instead the respondent used a 'lower export price' and as such artificially inflating the dumping margin.

[22] On this issue, s 17 of the CADD 1993 provides as follows:

> (1) *The export price shall be the price actually paid or payable for the subject merchandise*.
>
> (2) In cases where there is no export price or *where it appears that the export price is unreliable because the exporter and the importer or a third party are related, or that there is a compensatory arrangement between the exporter and the importer or a third party, the export price may be constructed on the basis of the price at which the subject merchandise is first resold to an independent buyer, or if the subject merchandise is not resold to an independent buyer*, or not resold in the contition imported, on any reasonable basis.
>
> (3) If the export price is constructed as described in subsection (2), allowance shall be made for all costs incurred between importation and resale.

[23] The provision of s 17(1) is plain and unambigious that the export price is the price actually paid for the subject merchandise which is the price paid by the importer. In the present case the Malaysian importer.

[24] Further, *Article 2.1* of the WTO-ADA states as follows:

> 2.1 For the purpose of this Agreement, a product is to be considered as being dumped, ie introduced into the commerce of another country at less than its normal value, *if the export price of the product exported from one country to another is less than the comparable price, in the ordinary course of trade*, for the like product when destined for consumption in the exporting country.

[25] Those words 'export price' under this article has been explained in a book by Edwin Vermulst titled *Oxford Commentaries on GATT/WTO Agreements — The WTO Anti-Dumping Agreement — A Commentary* at pp 14 and 15 as follows:

> Article 2.1 merely provides indirectly that the export price is the product exported from one country (the exporting country) to another (the importing country). *If, for example, producer x in country X sells T-shirts to importer y in country Y, then the price charged by producer x to importer y is the export price*. It may happen that foreign producer sell the product under consideration to other parties, typically traders, in the exporting country which will then resell it to the importing country. *On the basis of Article 2.1, it seems clear that the export price then is the price charged by the trader to the importer* ...

[26] This commentary further supports that export price is price actually paid by the importer.

[27] In furtherance to this, it is also undisputed fact that there is a compensatory agreement between the applicant and Benxi Hong Kong, the trader. The applicant exported its product to Malaysia through Benxi Hong Kong and commission has been paid by the applicant. All this information was submitted to the IA in the applicant questionnaire response and verified by IA.

[28] In this regard, by virtue of s 17(2) of the CADD 1993, the export price must be based on the price actually paid by the Malaysian importers.

[29] Further, the information about the compensatory agreement and other related fact which has been verified must be taken into account by the IA in consistent with para 3 and 6 of *Annex II: Best Information Available In Terms of Paragraph 8 of Article 6 of the World Trade Organization Anti-Dumping Agreement,* which are as follows:

(a) para 3:

> *All information which is verifiable, which is appropriately submitted so that it can be used in the investigation without undue difficulties, which is supplied in a timely fashion, and, where applicable, which is supplied in a medium or computer language requested by the authorities, should be taken into account when determinations are made*. If a party does not respond in the preferred medium

A or computer language but the authorities find that the circumstances set out in paragraph 2 have been satisfied, the failure to respond in the preferred medium or computer language should not be considered to significantly impede the investigation.

B (b) para 6:

If evidence or information is not accepted, the supplying party should be informed forthwith of the reasons therefor, and nshould have an opportunity to provide further explanations within a reasonable period, due account being taken of the time-limits of the investigation. If the explanations are considered by the C authorities as n ot being satisfactory, the reasons for the rejection of such evidence or information should be given in any published determinations.

[30] In the instant case, the IA has not informed the applicant that the information submitted by the applicant was not accepted.

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[31] Further, in the *WTO Panel Report — European Union Anti-Dumping Measures on Biodiesel from Indonesia WT/DS 480/R ('the EU-Biodiesel')*, the issue of determination of export price has been dealth with by the WTO Panel which is the actual price paid by the importer. This can be gleaned at E paras 7.112 to 7.114 which are the following:

7.112. Article 2.3 of the Anti-Dumping Agreement authorizes a Member of construct the export price where, inter alia, the actual export price is unrealiable because of association between the exporter and importer. *The plain language of Article 2.3 makes clear that 'the price charged to the first independent buyer is a* F *starting-point for the construction of an export price*'. Article 2.3 does not itself contain any guidance regarding the methodology to be employed in order to construct the export price. The only rules governing the methodology for construction of an export price are set forth in Article 2.4, which provides that '[i]n the cases referred to in paragraph 3, allowances for costs, including duties and taxes, incurred between G importation and resale and for profits accruing, should also be made'. The panel in US — Stainless Steel (Korea) found that this sentence authorizes the only allowances that can be made. After determining the price charged to the first independent buyer, an investigating authority would then work 'backwards from then price at which the imported products are first resold to an independent buyer'.

H 7.113. *There is no dispute that customers purchasing the biodiesel from P.T. Musim Mas' related importer are the first independent buyers*. The sole issue is whether the premium that the customer pays to P.T. Musim Mas' related importer is properly considered as part of the price that is charged to first independent buyers.

7.114. There is no prior guidance on the interpretation of the term 'price' as it I appears in the phrase 'the price at which the imported products are first resold to an in dependent buyer' in Article 2.3 of the Anto-Dumping Agreement. The Shorter Oxford English Dictionary defines the term 'price' as 'the sum in money of goods for which a thing is or may be bought or sold, or a thing or person ransomed or redeemed'. This would suggest that the phrase 'the price at which the imported products are first resold to an independent buyer' refers to the sum in money for

which the imported product was bought or sold. There is no further guidance regarding the term 'price'. In our view, as discussed in US — Stainless Steel (Korea), the language 'first resold' relates to the price being the starting point for the construction of the export price, from which an investigating authority would work 'backwards' to construct an export price that would have been paid by the related importer had the sale been made on a commercial basis. *Accordingly, in constructing the export price, we consider that the Member must begin by determining the sum in money for which the importer product was bought by or sold to an independent buyer. A member may thereafter make any adjustments for allowances to the extent permitted under the fourth sentence of Article 2.4 of the Anti-Dumping Agreement. However, this does not change the fact that a Member must begin with the price charged to the first independent buyer.*

[32] The case of *European Union — Anti-Dumping Measures on Imports of Certain Fatly Alcohol from Indonesia, Report of the Panel WTIDS 442/R ('the EU — Fatly Alcohol')* cited by the respondents to support the contention that the IA has complied with law and article 2.4 of WTO-ADA is clearly distinguisable on its facts. This case did not discuss the interpretation of 'export price'. Instead, it supports the applicant contention that in determining the export price, the actual price paid by importer must be used.

[33] In the circumstances, I find, the method of calculation by not using the export price, the price actually paid by the Malaysian importer is in contravention of s 17 of the CADD 1993 and in excess of their jurisdiction.

[34] The next issue is with regards the third respondent pre-judgment as third respondent signed the notice of affirmative determination on 27 February 2019 before the IA issued the final determination report on 7 March 2019.

[35] Clearly, the third respondent failed to take into account the relevant issues in the final determination report and pre-judged the matter when issuing the notice of affirmative determination. To me, this falls under '*Wednesbury* unreasonableness, it defies logic and irrational'.

[36] The respondents then argued that there was another final determination report relied by the third respondent but this report was not produced in court for reasons best known to the respondents as confidentiality does not barred the respondents to produce the report to support their contention.

[37] As to the issue of inadmissable affidavits filed by the applicant, firstly, as regard to the affidavit in support of Zhao Xiaoyu, a formal application to use the affidavit in this judicial proceeding has been made by the applicant and after hearing submissions by parties on 16 May 2019, the application was

A allowed and the respondents did not appeal against this decision. The issue is now res judicata and should not be relitigate again.

[38] The case of *SIS Forum (M) & Ors v Jawatankuasa Fatwa Negeri Selangor & Ors* [2018] 3 MLJ 706; [2018] 6 CLJ 748, is on point where the Court of
B Appeal ruled as follows:

> [18] We did not think this would make any difference, *as the preliminary objection was raised and the objection was considered and dismissed by the learned judge*. In any event, not all was lost for the first and third respondents. They could still raise the issue on appeal to this court after the review application had been finally determined
C on the merits by the High Court.
>
> [19] *A decision had been made that the High Court had jurisdiction to hear the judicial review application. The respondents elected to to appeal against the decision. What the respondents should have done under the circumstances was to abide by the decision* instead of making a fresh application before a different judge.

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[39] Further, the overriding interest of justice is paramount important and technical non-compliance in the present case which does not prejudice the respondent should not bar this court from hearing the merits of the
E application.

[40] In *Jagdis Singh a/l Banta Singh v Outlet Rank (M) Sdn Bhd* [2013] 4 MLJ 213; [2013] 3 CLJ 47, the Court of Appeal stated as follows:

> Rules of procedure should not be taken as a game of skill in which one oversight by
F counsel shall be decisive to the outcome of the case. The purpose of procedure is to facilite a proper decision on merits.

[41] As such the issue raised by the respondents is devoid of merits.

G **[42]** As to the issue that the second, fourth and sixth respondents are not legal entity and cannot be sued, the respondent is relying on s 21(1) of the Government Proceedings Act 1956, which states:

> 21 *Parties to proceedings by and against the Federal Government*
>
H (1) Civil proceedings by or against the Federal Government shall be instituted by or against, as the case may be the Government of Malaysia.

[43] However, in the present case, the second, fourth and sixth respondents are not being sued, but their decision are being challenged by the applicant. As
I such, s 21(1) of the Government Proceedings Act 1956 has no application in the present case.

[44] In this regard, I am in agreement with the observation by the judge in *Ketua Pengarah Kastam dan Eksais v Altus Logistic Malaysia Sdn Bhd* [2019]

MLJU 1328; [2019] 1 LNS 270, which stated as follows:

> [12] ... Added to that, the appellant submits that the GST Tribunal is not a legal entity to be made a party, and relied on several cases, including the case of *Sri Devi a/p Kanan & Ors v Malaysian Airline System Bhd & Ors* [2017] 7 MLJ 305 ; [2017] 2 CLJ 728, *where the court held as follows:*
>
> > [22] Both the DCA and jabatan lmigresen are government departments, and have no separate legal personality. For this reason alone, the striking out against the fourth and sixth defendants was allowed. The action would be properly maintained against the ninth defendant, the Government of Malaysia.
>
> [13] In the first place, this is not a suit *against* the GST Tribunal, but an appeal from the decision of the GST Tribunal, so the cases relied by the Appellant are not relevant. It is trite law that no suit lies against government departments as the same has no legal entity. *However, the GST Tribunal here is not being sued, but its decision is being challenged by the Appellant.*

[45] In addition, s 34A of the CADD 1993 provides the right for judicial review against the decision of the government which provides as follows:

> (1) An interested party who is not satisfied or who is aggrieved by the decision of the Government in relation to a final determination or a final administrative review determination under this Act *shall have the right to refer such mater to the High Court for judicial review in accordance with* Order 53 of the Rules of the High Court 1980 (PU (A) 50/80).
>
> (2) A request for judicial review shall be filed in the High Court within thirty days after the publication of the final determination or the final administrative review determination in question.

CONCLUSION

[46] Premised on the aforesaid reasons, the applicant's judicial review application is allowed with costs of RM15,000.

Application allowed with costs.

Reported by Izzat Fauzan